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No. 06-643

In the Supreme Court of the United States

STACEY MILLER
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF NORTHWESTERN UNIVERSITY'S CENTER ON WRONGFUL CONVICTIONS AND OTHER INNOCENCE PROJECTS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a federal court of appeals' failure to hold oral argument violates Federal Rule of Appellate Procedure 34(a)(2) and procedural due process where the dissenting judge objects to the panel's summary treatment of the appeal and explicitly states a desire for oral argument.

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INTRODUCTION

This case is part of a growing and dangerous trend in the federal courts—a trend that threatens the ability of criminal defendants and inmates to receive meaningful appellate review of their convictions. It concerns the practice of resolving appeals without oral argument, even where not all members of the appellate panel agree that the case should be resolved in that manner. The Federal Rules of Appellate Procedure specifically limit the circumstances under which an appellate panel may resolve a case without oral argument. The decision of the Seventh Circuit and others to ignore that limitation poses serious concerns for criminal defendants who rely on federal appellate and collateral review to ensure protection for their constitutional rights. *Amici* submit this brief to alert the Court of the unique harm this practice imposes on the wrongfully convicted. *Amici* respectfully urge this Court to intervene in this case to protect the availability of oral argument under the Federal Rules.

INTEREST OF *AMICI CURIAE*[1]

This brief is filed on behalf of Northwestern University's Center on Wrongful Convictions, the Indiana Innocence Project, the Wisconsin Innocence Project, and First Defense Legal Aid.

Northwestern University's Center on Wrongful Convictions was organized in 1999 as a program of the Bluhm Legal Clinic at Northwestern University School of Law. The Center is partially funded by the School of Law

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[1] All parties have consented to the filing of this brief. Letters evidencing such consent are on file with the Clerk. No party or counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel has made a monetary contribution to the preparation or submission of this brief.

but relies on private funding for more than half of its operating expenses. Dedicated to identifying and rectifying wrongful convictions and other serious miscarriages of justice, the Center investigates possible wrongful convictions and represents imprisoned clients with claims of actual innocence. The Center or members of its staff have been instrumental in the exoneration of ten men who were sentenced to death in Illinois. The Center has a well-established tradition of researching the prevalence, causes, and social costs of wrongful convictions and advocating reforms designed to improve the accuracy and fairness of the criminal justice system.

The Indiana Innocence Project is a program of the Law Clinic at the Indiana University School of Law—Indianapolis. The mission of the Law Clinic is to provide representation to the underserved while advancing justice. The School's Wrongful Conviction Component of the Criminal Defense Clinic is a founding member of the Innocence Network. Representation is provided to Indiana inmates challenging their convictions in state and federal courts based on newly discovered scientific evidence and/or constitutional infirmity.

The Wisconsin Innocence Project was founded in 1998 as a project in the Frank J. Remington Center at the University of Wisconsin Law School. The Project provides legal assistance to federal and state inmates in Wisconsin and neighboring states who have provable claims that they were wrongly convicted. Under the supervision of attorneys, approximately 20 law students enrolled in the program investigate and litigate claims of innocence on behalf of prisoners.

Since its founding in 1995, First Defense Legal Aid ("FDLA") has worked to protect civil rights by offering free twenty-four-hour legal representation and advice to any individual taken into Chicago Police Department

custody until a public defender has been assigned by the court system. If a station visit is necessary, FDLA volunteers interview the arrestee, inform the arrestee of his or her constitutional rights, provide the arrestee with bond information, and serve as a link between the arrestee and his or her family.

Amici are uniquely well situated to advise the Court on the importance of oral argument to the wrongfully convicted and to those who believe their constitutional rights were violated in their criminal prosecutions. *Amici* are concerned that the increasing tendency of the federal courts of appeals to dispense with oral argument in the direct and collateral review of criminal convictions diminishes the effectiveness of such review, flouts the purposes of Rule 34, and undermines the courts' ability to detect and vacate wrongful convictions. Given their extensive experience representing the interests of the wrongfully convicted, both on direct appeal and in federal collateral proceedings, *Amici* have a substantial interest in the outcome of this case.

STATEMENT

This case provides a dramatic illustration of the dangers of dispensing with oral argument outside the circumstances outlined in Rule 34. Thus, *Amici* offer the following brief summary of the factual and procedural history in this case:

During his trial on federal drug charges, Petitioner's trial counsel failed to provide timely notice of three alibi witnesses who would have testified that Petitioner was out of town on the day in question. Pet. 4.[2] Counsel's

[2] "Pet. __" refers to the Petition for a Writ of Certiorari, which was filed with this Court on November 6, 2006. "Pet. App. __" refers to the Appendix filed with the Petitioner's Petition for a Writ of Certiorari.

failure resulted in the exclusion of the alibi witnesses' testimony. *Ibid.*

After he was convicted, Petitioner brought a petition for collateral review under 28 U.S.C. § 2255 arguing, *inter alia*, that his trial counsel's failure to provide timely notice of the alibi witnesses constituted ineffective assistance of counsel. Pet. 6-7. The district court denied the petition but issued a certificate of appealability as to Petitioner's ineffective assistance claim, noting that it could not "say that a reasonable judge would not make a different decision" regarding that claim. Pet. App. 16a; see also Pet 7. Petitioner timely appealed the district court's order denying his § 2255 petition to the United States Court of Appeals for the Seventh Circuit. Pet. 7.

Without hearing oral argument, a divided panel of the Seventh Circuit issued an unpublished order summarily affirming and adopting the district court's order. Pet. App. 1a-18a; see also Pet. 7. The dissenting judge objected to the summary treatment of Petitioner's appeal, noting that "the appeal cannot be considered facially frivolous" and that "[i]ndeed, both parties have submitted extensive and thoughtful briefs." Pet App. 18a; see also Pet. 8. The dissent also stressed that the district court's opinion was not "totally responsive" to the Petitioner's arguments on appeal and concluded that the panel did not fulfill its obligation to this Court to adequately explain its decision. *Ibid.* The dissent concluded by stating that he "would set this case for oral argument in due course." *Ibid.*

SUMMARY OF ARGUMENT

Direct and post-conviction review in the federal appellate courts is an invaluable safeguard against wrongful convictions. Direct appeals play a critical role in assuring the accuracy of criminal adjudications. Federal collateral review complements direct appellate review and

provides a vitally important mechanism for correcting constitutional violations that cannot be adequately addressed on direct appeal, including the ineffective assistance of counsel. Procedural shortcuts that weaken direct or collateral review in criminal cases—such as the denial of oral argument—increase the likelihood that wrongful convictions will be erroneously upheld on appeal.

Oral argument enhances the rigor, accuracy, and transparency of judicial decisionmaking. It focuses the attention of judges, challenges them to reflect critically about their preliminary assessments of a case, and forces them to confer and to decide cases collectively. All of this promotes careful and accurate judicial decisions. Oral argument also gives litigants an invaluable opportunity to respond directly to the judges' concerns before the case is decided and to present their case in open court, thereby promoting fairness, transparency, and judicial accountability. No amount of briefing can achieve these important results. For all these reasons, oral argument plays an important role in helping federal reviewing courts to detect and vacate wrongful convictions.

Nevertheless, oral argument has become the exception rather than the rule. Over seventy percent of criminal appeals decided on the merits in the federal courts of appeals are now decided without oral argument. The rate is even higher for appeals of habeas corpus claims. Although Rule 34 allows courts to dispense with oral argument under certain circumstances, the Rule requires all such decisions to be unanimous, thereby guaranteeing oral argument if even one judge on the panel thinks it appropriate. This important safeguard was disregarded in Mr. Miller's case, and this case is not alone. The practice of denying oral argument under these circumstances contravenes the letter and spirit of Rule 34 and increases the risk that a wrongful conviction will be

summarily affirmed without receiving the careful, sustained attention of a panel of judges.

This case amply illustrates the dangers of a hasty and non-unanimous denial of oral argument. Mr. Miller's appeal was not frivolous, and neither the district court nor the Government treated it as such. To the contrary, the district court granted Mr. Miller a certificate of appealability, and the Government thoroughly and carefully briefed the issues in the case. Despite the serious arguments offered by Mr. Miller's counsel, the Seventh Circuit adopted the analysis of the district court without further analysis of its own. And in doing so, the Court resolved Mr. Miller's claims in a manner that conflicts with precedent in the Sixth Circuit. As the dissent explained, oral argument should not have been denied under these circumstances.

ARGUMENT

I. Federal appellate and post-conviction review plays a vital role in the detection and reversal of wrongful convictions.

Direct and post-conviction review of federal criminal convictions is an invaluable safeguard against wrongful convictions. Direct appeals "play a critical role in assuring the accuracy of criminal adjudications." Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 U.C.L.A. L. REV. 503, 578-79 (1992). A significant number of federal direct appeals lead to the reversal of erroneous convictions. *Id.* at 514-15. For example, in the twelve-month period ending on September 30, 2005, eleven percent of the criminal appeals decided on the merits by the federal courts of appeals resulted in reversals. See Judicial Business of the United States Courts, Table B-5, available at http://www.uscourts.gov/judbus2005/appendices/b5.pdf.

The reversal rate in the Third Circuit was over twenty-four percent. *Ibid.*

The complexity of contemporary criminal trials makes a direct appeal from a federal criminal conviction all the more important. Since the 1960s, constitutional criminal procedure has become "increasingly intricate," making it "less likely that a single authority can generate an accurate result." Arkin, at 514-15, 574. Trial judges must now rule on a myriad of complex procedural motions that affect the outcome of a trial. *Id.* Moreover, the complicated and difficult constitutional issues that are frequently raised in contemporary federal criminal trials "enhances the likelihood of trial error * * * and the corresponding need for corrective appellate process." *Id.* at 575. For all these reasons, procedural shortcuts that abridge the right to appeal "subject defendants to a material risk of erroneous conviction." *Id.* at 514-15.

As this Court has repeatedly recognized, federal collateral review of state and federal criminal convictions is an equally indispensable bulwark against wrongful convictions. See, *e.g.*, *O'Neal* v. *McAninch*, 513 U.S. 432, 442 (1995) (a basic purpose of habeas corpus is to cure "error of constitutional dimension—the sort that risks an unreliable trial outcome"); *Bousley* v. *United States*, 523 U.S. 614, 620 (1998) ("one of the principal functions of habeas corpus [is] to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted") (citation and internal quotation omitted). Not all fundamental trial errors are corrected on direct appeal. Indeed, certain claims of constitutional violations—such as claims of ineffective assistance of counsel—cannot be adequately addressed on direct appeal. Such claims usually require an evidentiary hearing to prove non-record facts regarding the claimed ineffectiveness, such as whether the defendant's lawyers

incompetently failed to find exculpatory evidence; whether there existed a strategic justification for the lawyer's apparently unreasonable conduct; the extent of the lawyer's knowledge at the time, and so on.[3] See Lisa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241, 1272-73 (2001); James S. Liebman, Jeffrey Fagan, and Valerie West, *A Broken System, Part I: Error Rates in Capital Cases, 1973-1995*, 325 available at http://www.thejusticeproject.org/ press/reports/pdfs/Error-Rates-in-Capital-Cases-1973-1995.pdf. Accordingly, "[t]he correction of this type of error is * * * unlikely to be accomplished on direct appeal," and most ineffective assistance claims "must be brought in a post-appellate collateral attack proceeding which, in the federal courts, means a federal habeas corpus proceeding pursuant to 28 U.S.C. § 2255." Griffin, 16 AM. U. INT'L L. REV. at 1272-73.[4]

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[3] Claims of prosecutorial misconduct (*e.g.*, claims alleging that prosecutors withheld or suppressed exculpatory information from the defense) also require additional fact-finding and the consideration of non-record evidence. Prosecutorial misconduct is a factor in a substantial number of wrongful convictions and is a common basis for reversal. See, *e.g.*, James S. Liebman, Jeffrey Fagan, & Valerie West, *A Broken System, Part II: Why There Is So Much Error In Capital Cases, And What Can Be Done About It*, Questions About the Study at 7, available at http://www.thejusticeproject.org/press/reports/a-broken-system-part-ii-qa.html.

[4] Ineffective assistance of counsel "is a significant cause of wrongful convictions in the United States." Griffin, 16 AM. U. INT'L L. REV. at 1272. A recent landmark study of wrongful convictions found that "32 percent of the wrongfully convicted had subpar or outright incompetent legal help." Barry Scheck, Peter Neufeld, and Jim Dwyer, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 242 (New

A substantial number of unconstitutional convictions and sentences are vacated on federal collateral review. In the year 2000, 11.6% of all petitioners who brought claims under 28 U.S.C. § 2255 were successful. See http://teddy.law.cornell.edu:8090/questcv3.htm.[5] The success rate for such claims in the Seventh Circuit that year was twenty-eight percent. *Ibid.*[6] These statistics

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American Library, 2003). Another study concluded that ineffective assistance was the "primary cause" of almost three percent of all unjust convictions. Adele Bernhard, *Effective Assistance of Counsel*, in WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE, ed. Saundra D. Westervelt and John A. Humphrey, Rutgers University Press, 2001, at 237 n.20 (citation omitted). The problem is even more pervasive in capital cases, where "incompetent lawyering" is "by far and away" the most common basis for habeas reversal. Liebman, *et al.*, *A Broken System, Part II: Why there Is So Much Error In Capital Cases, And What Can Be Done About It*, Questions About the Study at 7,available at http://www.thejusticeproject.org/press/reports/a-broken-system-part-ii-qa.html.

[5] This webpage features a database of federal district-court civil cases terminated from 1987-2000, searchable by type of claim raised and disposition. The data were gathered by the Administrative Office of the United States Courts, assembled by the Federal Judicial Center, and disseminated by the Inter-university Consortium for Political and Social Research.

[6] The success rate for federal habeas corpus claims brought by state prisoners in non-capital cases is lower than the success rate for claims brought pursuant to § 2255. See Roger A. Hanson and Henry W. K. Daley, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions*, BUREAU OF JUSTICE STATISTICS, NCJ-155504 (September 1995), at 17 (finding that federal courts "granted 1% of the issues" on the merits in § 2254 habeas proceedings); http://teddy.law.cornell.edu:8090/questcv3.htm (success rate in all federal districts for claims decided in the year 2000 was 3.5%). Although these rates may seem comparatively low at first blush, it must be

confirm that federal collateral review plays a critical role in detecting and correcting fundamental errors and violations of a defendant's constitutional rights—many of which cannot be adequately addressed on direct appeal. This makes it a unique and indispensable tool for preventing wrongful convictions.

II. The increasing tendency of federal courts of appeals to dispense with oral argument in cases like this one diminishes the effectiveness of post-conviction review and undermines the courts' ability to vacate wrongful convictions.

Oral argument enhances the accuracy, fairness, and transparency of judicial decisionmaking. It therefore plays an important role in helping federal reviewing courts to detect and vacate wrongful convictions. As discussed further below, cases decided without oral argument are more likely to be summarily affirmed without receiving careful, sustained attention by a panel of judges. This increases the risk that some wrongful convictions will be erroneously upheld on appeal.

Nevertheless, federal courts of appeals now decide the great majority of appeals without oral argument. This trend is increasing, and it is particularly pronounced on collateral review. The routine denial of oral argument contravenes the purposes of Rule 34. Although that Rule permits a panel of judges to dispense with oral argument in appropriate circumstances, it requires all such decisions to be unanimous, ensuring that every case will receive the attention deemed appropriate by the most cautious judge on the panel. This important safeguard was disregarded in Mr. Miller's case, and this is by no

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remembered that most state prisoners who bring claims under § 2254 have received a full round of state post-conviction review before filing their federal claims under § 2254.

means an isolated occurrence. The wholesale denial of oral argument in this manner weakens federal reviewing courts' ability to detect and correct wrongful convictions. Mr. Miller's case is a prime example of the erroneous and prejudicial denial of oral argument.

A. Oral argument promotes careful and accurate judicial decisionmaking and increases the fairness and transparency of the appellate process.

Oral argument increases the rigor and accuracy of judicial decisions. As many judges have acknowledged, oral argument "engages the attention of judges and makes them think, question, discuss, and reconsider a case as can nothing else, including able briefs and judicial opinions on analogous points." Gilbert S. Merritt, *Judges on Judging: The Decisionmaking Process in Federal Courts of Appeals*, 51 OHIO STATE L.J. 1385, 1386-87 (1990). Because oral argument proceedings "come at a crucial time" in the process—immediately before the judges confer and vote on the case—oral argument has a unique ability to "focus[] [a judge's] thought and reflection" and "present the possibility for fresh perspectives on a case." Timothy R. Johnson, *The Influence of Oral Argument on the U.S. Supreme Court*, AM. POL. SCI. REV., Vol. 1000, No. 1 at 99 (quotation omitted); see also Merritt, 51 OHIO STATE L.J. at 1387.

In addition, oral argument is "an essentially collegial function" that promotes debate and collective decision-making by the judges. In effect, oral argument is "the preliminary conference for deciding the case." Hon. Joseph W. Hatchett & Robert J. Telfer, III, *The Importance of Oral Argument*, 33 STETSON. L. REV. 139, 142 (Fall, 2003). As "one of only two occasions on which the judges get together to consider the case," it "provides an important forum for [the] interchange of ideas between

* * * the judges." Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 Iowa L. Rev. 35, 37 (Oct. 1986); Stanley Mosk, *In Defense of Oral Argument*, 1 J. OF APP. PRACTICE AND PROCESS 25, 26 (Winter 1999). Questions posed by one judge during argument may stimulate the thinking of another judge on the panel and may even "convince a doubtful colleague who had previously indicated reservations to reach a preferred conclusion." *Ibid.* As Senior Judge Frank Coffin of the First Circuit Court of Appeals put it,

> By their questions and comments to counsel, judges telegraph their concerns and preferences to other judges. Oral argument is really the first stage of the conferencing among the judges. How often I have begun argument with a clear idea of the strength or weakness of the decision being appealed, only to realize from a colleague's questioning that there was more, much more to the case than met my eye.

Mosk, 1 J. OF APP. PRACTICE AND PROCESS 27 (quoting Hon. Frank M. Coffin, ON APPEAL: COURTS, LAWYERING, AND JUDGING 132-33 (1994)).

Moreover, oral argument gives counsel an opportunity to respond directly to the particular concerns that the judges might have about the case. Justice Scalia aptly characterized the practice of many judges when he said, "I use [oral argument] to give counsel his or her best shot at meeting my major difficulty with that side of the case. 'Here's what's preventing me from going along with you. If you can explain why that's wrong, you have me.'" Hatchett & Telfer, 33 STETSON. L. REV. at 142. Attorney responses to such questions from the bench "may alter a previous tentatively reached conclusion," and may help

focus the judges on what counsel believes are the important facts and legal principles. Mosk, 1 J. OF APP. PRACTICE AND PROCESS at 27. In short, oral argument "brings the specific decisional process into the open," "gives new insight into the judge's view of the case," and gives counsel an opportunity to respond to the judges' concerns. Michael E. and Jane B. Tigar, FED. APPEALS JURIS. & PRACTICE, § 10.1 (1997).

This opportunity can be invaluable, particularly because oral argument frequently "develops a new issue overlooked or not adequately briefed" by the parties. Mosk, 1 J. OF APP. PRACTICE AND PROCESS at 26.[7] Comments made by the judges during oral argument "may show the advocate that something vital is missing from the briefs, or that an important piece of evidence has been overlooked." Tigar, FED. APPEALS JURIS. & PRACTICE, § 10.1. In such cases, oral argument is counsel's only chance to respond to the judges' concerns before the case is decided, and it gives the court an opportunity to order supplemental briefing on potentially dispositive issues that were not initially briefed. *Ibid.*

The rigorous dialogue between judges and counsel and between the judges themselves may well influence the outcome of the case. Oral argument "help[s] [judges] come to terms with what are often complex legal and

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[7] Professor Johnson's comprehensive studies of oral arguments presented before this Court demonstrate that the Court frequently "uses oral arguments to obtain information beyond that which is provided by the parties" in the briefs. Timothy R. Johnson, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT 55-56, State University of New York Press, 2004. Indeed, Professor Johnson concludes that "[a]lmost 80 percent of all the * * * questions" posed by justices during oral argument "refer to arguments that were not raised in the[] briefs." *Id.* at 126.

factual issues," and strongly influences decisions on the merits. Johnson, AM. POL. SCI. REV., at 112. In short, "oral arguments matter to the decision of the case." *Ibid.*

The opportunity to engage the judges directly in open court is particularly important in vindicating the rights of the wrongfully convicted. Oral argument is "the right to be heard made concrete." Merritt, 51 OHIO STATE L. J. at 1387. Through oral argument, the wrongfully convicted are given a chance to present their case directly to the judges who will decide their fate, to answer their questions through counsel, and to persuade them of the injustice of their conviction. Oral argument also allows a wrongfully convicted defendant to have his voice heard in open court, reinforcing the appearance of a fair and open appellate proceeding.[8] It also brings allegations of serious trial error and unjust convictions to the clear light of day, enabling members of the public to hear and understand them. This promotes transparency in the justice system and judicial accountability, which serves the interests of the wrongfully convicted and the broader public.

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[8] This legitimizes the authority of the reviewing court and promotes public confidence in the legal system. See Patricia M. Wald, *Bureaucracy and the Courts*, 92 YALE L.J. 1478, 1484 (1983) ("the fact that [judges] actually listen to, question, and may be directly moved by litigants [during oral argument] is imperative to the respect the public grants [them] and the authority that flows from that respect"); Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 FLA. ST. U. L. REV. 913, 919 (Spring 1995) ("An important value of oral argument lies in the legitimating function of allowing the litigants to address the decisionmaker face to face.").

B. Federal courts of appeals are denying oral argument with increasing frequency, particularly on collateral review.

Despite the obvious value and importance of oral argument in the review of criminal convictions, it is now the exception rather than the rule. Throughout the past several decades, federal courts have been steadily cutting back on oral argument. A study conducted in 1990 found that between forty and fifty percent of appeals decided on the merits by the federal courts of appeals were decided without oral argument. Baker, 22 FLA. ST. U. L. REV. at 916. The study also found that when oral argument was allowed, it was usually abbreviated—frequently to fifteen minutes per side. *Id.* at 917.

This trend is only getting worse. According to statistics published by the Administrative Office of the U.S. Courts, only 30.1% of all appeals terminated on the merits in the federal courts of appeals during the twelve-month period ending September 30, 2005 were decided after oral argument, with 69.9% decided on the briefs. See Judicial Business of the United States Courts, 2005 Annual Report of the Director, Supplemental Table S-1, available at http://www.uscourts.gov/judbus2005/tables/s1.pdf.[9] The rate is even lower for criminal appeals. Of 8,614 criminal appeals terminated on the merits during that twelve-month period, only 2,436 (or 28.3%) were afforded oral argument. *Id.*, Appendix: Detailed Statistical Tables, Table B-1A, available at http://www.uscourts.gov/judbus2005/appendices/b1a.pdf.

This widespread increase in denials of oral argument is particularly pronounced in appeals of federal habeas claims. Federal judges consistently deny oral argument

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[9] The rate of oral argument was lowest in the Fourth and Eleventh Circuits (15.8% and 15.4%, respectively). *Ibid.*

at a substantially higher rate in these types of appeals. Of the 636 non-capital habeas appeals actually decided on the merits during the same twelve-month period, only 109 (or 17.1%) received an oral hearing. *Ibid.* The remaining 82.9% were decided on the briefs. *Ibid.* As noted, 30.1% of all appeals (and over 28 percent of all criminal appeals) are decided following oral argument. Thus, the appellant in a habeas case is *almost twice as likely* to be denied oral argument in a federal appellate court as the average appellant.

C. The widespread denial of oral argument on direct and collateral review increases the likelihood that wrongful convictions will stand.

The increasing tendency of federal courts of appeals to decline oral argument on direct and collateral review of criminal convictions undermines their ability to detect error and increases the likelihood that they will erroneously affirm wrongful convictions. Studies show that cases decided without oral argument "are likely to be affirmed and are affirmed at a higher percentage than cases afforded an argument." Baker, 22 FLA. ST. U. L. REV. at 917; see also Bright, 72 IOWA L. REV. at 43 ("nonargued cases almost invariably result in an affirmance of the district court's decision"); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 280-81 (January 1996). This is not surprising, because cases that are not argued do not receive the sustained, focused attention from an entire panel of judges that argued cases receive.

Unlike a case which has received oral argument, "no collegial conference between the judges accompanies the disposition of the nonargument case." Rather, non-argument cases are typically "pre-assigned to the lead

judge." Bright, 72 IOWA L. REV. at 43. This "makes it less likely that the panel will focus on the case at the same time," Baker, 22 FLA. ST. U. L. REV. at 922, and it increases the likelihood that the resulting opinion will be "essentially the product of one judge and that judge's staff" rather than the considered judgment of the entire panel. Bright, 72 IOWA L. REV. at 43; see also Baker, 22 FLA. ST. U. L. REV. at 922-23. Indeed, even the judge to whom the non-argued case is assigned is likely to devote less attention to the case than he would if it were argued and to rely more on staff attorneys than he otherwise would. Cecil & Stienstra, FEDERAL JUDICIAL CTR. 87-5, at 68; Baker, 22 FLA. ST. U. L. REV. at 922.

In addition, non-argued cases do not benefit from the "free interchange of ideas pursued at oral argument," which "increases the court's ability to reach the right and just result." Bright, 72 IOWA L. REV. at 38. And deciding an appeal without oral argument makes judges "less accountable to litigants, and decreases the visibility of the appellate process." Baker, 22 FLA. ST. U. L. REV. at 922.

For all these reasons, the wholesale denial of oral argument makes it more likely that some wrongful convictions will be erroneously affirmed on appeal. This "represents a profound threat to a critical part of the appellate function." *Ibid.* Indeed, one commentator has concluded that "the design of the system has been compromised, severely and profoundly, and possibly irretrievably, by such proportionally high rates of denial of oral argument." *Id.* at 920. At a minimum, the courts' current practice of denying oral argument in the majority of appeals contravenes the purpose of Rule 34 by "revers[ing] the presumption in favor of oral argument in every appeal to what amounts to a de facto presumption that most appeals can be decided without oral argument." *Id.* at 923. As one commentator aptly noted, this practice

renders Rule 34's promise of oral argument "Orwellian." *Ibid.*

The pernicious effects of the routine denial of oral argument are likely to be greatest in appeals of federal habeas cases. As noted, federal courts deny oral argument at a substantially higher rate in these types of appeals. Thus, these cases are even less likely to benefit from the focused judicial attention that oral argument brings. This diminishes the effectiveness of collateral review and further increases the risk of wrongful convictions.

In addition, the widespread denial of oral argument in appeals of federal collateral proceedings is particularly inappropriate, because such appeals *have already been determined to be non-frivolous* by at least one federal judge. The federal post-conviction statutes contain a screening procedure designed to preclude frivolous appeals. A federal district court's denial of a petition for collateral relief under § 2254 or § 2255 may not be appealed unless either the district court or the court of appeals first issues a certificate of appealability, which may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(1)-(2). Appeals that pass this statutory screening procedure (like Mr. Miller's) have already been determined not to be frivolous. Under these circumstances, it is particularly inappropriate to deny oral argument.

D. The denial of oral argument in this case directly violated FRAP 34(a)(2) and was otherwise inappropriate.

Even if it is appropriate to limit oral argument in certain cases, denying oral argument was clearly wrong in Mr. Miller's case. This is true for several reasons. First, the panel's denial of oral argument in Mr. Miller's case

directly flouted Rule 34. Rule 34 guarantees oral argument unless "a panel of three judges who have examined the briefs and record *unanimously agree* that oral argument is unnecessary[.]" Fed. App. Civ. P. 34(a)(2) (emphasis added). It therefore gives a single judge the right to require the panel to hear oral argument even where the remaining judges on the panel think it unnecessary. This "assures that each case receives the attention thought appropriate by the most cautious judge on the panel." Cecil & Stienstra, FED. JUDICIAL CTR. 87-5, at 161; see also Pet. at 12. Nevertheless, the panel in this case denied oral argument even though one member of the panel expressed a preference for oral argument and dissented on that basis. This is a clear violation of the plain terms of Rule 34.

The Seventh Circuit's violation of Rule 34 in this case is by no means an isolated occurrence. Several other federal appellate panels have denied oral argument over the objections of a dissenting judge who expressed a desire for oral argument. *See, e.g.*, *Gravatt* v. *Paul Revere Life Ins., Co.*, No. 02-17028, 2004 WL 1257716, at *67 (9th Cir. 2004) (Wallace, J., dissenting); *United States* v. *Lambert*, 963 F.2d 711, 719 (5th Cir. 1992) (Wisdom, J., concurring and dissenting); *Bowers* v. *DeVito*, 686 F.2d 616, 619 (7th Cir. 1982) (Wood, J., dissenting). But such cases may represent only the tip of the iceberg. Because violations of the Rule come to light only in the rare cases involving written dissents, as in Mr. Miller's case, we have no way of knowing for certain how frequently such violations occur. However, a recent study that examined federal circuit court screening procedures for oral argument suggests that violations of the spirit—if not the letter—of Rule 34 may be common. That study found that the decision whether to grant oral argument was in practice driven more by the individual circuit judge's "attitudes toward oral argument" than by the court's

formal screening protocol, and that "many judges share a concern that there is a kind of judicial peer pressure in screened appeals making them reluctant to state a preference for oral argument." Baker, 22 FLA. ST. U. L. REV. at 921-22.

Second, as noted, Mr. Miller's appeal passed the rigorous initial screening under § 2253(c). In issuing a certificate of appealability, the district court stated that it could not "say that a reasonable judge would not make a different decision" regarding Mr. Miller's ineffective assistance of counsel claim. Pet App. 16a. Thus, it was inappropriate for the panel to assume that Mr. Miller's claim did not merit oral argument, particularly in light of the dissenting judge's statements to the contrary.

Third, the issue presented in Mr. Miller's appeal was manifestly not frivolous. As Mr. Miller argued in his brief on appeal, the Seventh Circuit's resolution of his claim was inconsistent with authority from another circuit. See Pet. 15-18. The Government did not treat Mr. Miller's appeal as frivolous or suggest that it was eligible for summary disposition. Indeed, as the dissent noted, both Mr. Miller and the Government carefully and thoroughly briefed the issue. In sum, both parties gave careful consideration to the appeal in their briefs, and the appeal deserved a correspondingly careful review by the Court, including oral argument.

For all these reasons, this Court should grant Mr. Miller's Petition for Certiorari to enforce the requirements of Rule 34(a)(2) and to prevent the increasingly widespread violations of the Rule.

CONCLUSION

For the foregoing reasons, the undersigned *Amici* urge this Court to grant Mr. Miller's Petition for Certiorari.

Respectfully submitted,

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